NO. 2638.

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

October Term, 1915.

GEORGE S. FULLINWIDER,
Complainant and Appellant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, et al.,
Defendants and Appellees.

BRIEF FOR DEFENDANTS AND APPELLEES

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STATEMENT OF THE CASE.

This is an action to compel the conveyance to Complainant of a half section of land situated within the limits of the Congressional grant made to the Southern Pacific Railroad Company by the Act of March 3, 1871, (16 Stat. L. 573). The land in question is not withi the limits of the grant made to the Texas & tained in the same act. The complaint alleges that a tender at the rate of $2.50 an acre was made to the defendant with a demand for a conveyance of the

land in question but that this conveyance was refused. The Complainant relies upon that portion of Section 9 of the Act of March 3, 1871, which reads as follows:

> "And provided further that all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of $2.50 per acre for all lands herein granted."

The defendants moved the Court to dismiss the action upon the ground, among others, that the bill of complaint did not state facts sufficient to constitute a cause of action in equity, or otherwise, or at all. This motion was granted, without leave to amend, and a decree was entered finally dismissing the bill. The Complainant has appealed to this Court from the decree of dismissal.

POINTS AND AUTHORITIES.

I.

IF THE PROVISION IN SECTION 9 ABOVE QUOTED SUBJECTING THE LANDS TO SETTLEMENT AND PRE-EMPTION AT A PRICE TO BE FIXED BY AND PAID TO THE RAILROAD COMPANY NOT EXCEEDING AN AVERAGE OF $2.50 PER ACRE WAS APPLICABLE TO THE GRANT MADE TO THE SOUTHERN PACIFIC RAILROAD COMPANY, COMPLAINANT WOULD NOT BE ENTITLED TO ANY RELIEF.

This provision of the statute does not constitute any contract between the Railroa d Company and Complainant which could be enforced by a suit for specific performance. The Railroad Company does not hold the land in trust for Complainant. There is no contract because no offer has ever been made by the Railroad Company, either of its own volition or through the act of Congress making the grant, of which the Complainant is entitled to take advantage. There is no trust because no specific beneficiary is named and the language used does not indicate an intention to create a trust in favor of anyone. There is nothing in the statute which requires the Railroad Company to sell within any particular period, or to sell one acre, or a thousand acres.

U. S. v. O. & C. Ry. Co., 186 Fed. 861;

O. & C. Ry. Co v. U. S., 59 L. Ed. 917.

This point does not, however, have any relevancy if we are correct in our contention that the provision in Section 9 of the act subjecting the lands to settlement and pre-emption at a price not exceeding an average of $2. 50 per acre is not applicable to the grant made by the same act to the Southern Pacific Railroad Company.

II.

THE PROVISION IN SECTION 9 ABOVE QUOTED SUBJECTING THE LANDS TO SETTLEMENT AND PRE-EMPTION AT A PRICE FIXED BY AND PAID TO THE RAILROAD COMPANY NOT EXCEEDING AN AVERAGE OF $2.50 PER ACRE IS NOT APPLICABLE TO THE GRANT MADE TO THE SOUTHERN PACIFIC RAILROAD COMPANY AS THE GRANT TO THE LATTER COMPANY WAS "WITH THE SAME RIGHTS, GRANTS AND PRIVILEGES AND SUBJECT TO THE SAME LIMITATIONS, RESTRICTIONS AND CONDITIONS AS WERE GRANTED TO SAID SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA BY THE ACT OF JULY 27, 1866." THE GRANT OF JULY 27, 1866 CONTAINS NO PROVISION WITH REFERENCE TO THE SALE OR THE SETTLEMENT OR PRE-EMPTION OF LANDS GRANTED TO THE COMPANY.

The act of March 3, 1871, above referred to purports to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its railroad the United States government, by act of Congress, empowered the Texas & Pacific Railroad Company to construct a railway and telegraph line on the easterly line of Texas, through El Paso and Yuma, to Ship's Channel in the Bay of San Diego in this State. By Section 9 of that act there was granted to the Texas & Pacific Railroad Company every alternate section of public land, not mineral, to the amount of twenty alternate sections per mile on each side of its railroad line through the territories of the United States and ten alternate sections in California. Section 9 of the act contained the provision

above quoted, stating that the lands therein granted should be subject to settlement and pre-emption like other lands at a price to be fixed by and paid to the company not exceeding an average of $2.50 per acre for all the lands therein granted. In subsequent sections of the act provision was made for the filing of a map of the route and designation thereby of the lands which should vest in the railroad company under the above-mentioned provision.

The Southern Pacific Railroad Company is not mentioned, however, until Section 23 of the act is reached. This section is as follows:

> "That, for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seventh, eighteen hundred sixty-six: Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company."

It will be noticed that the grant to the Southern Pacific Railroad Company is not upon the same terms or conditions or with the same rights and privileges as the grant to the Texas Pacific. The grant to the

Southern Pacific Railroad Company is "with the *same* rights, grants and privileges and subject to the *same* limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seventh, eighteen hundred sixty-six: Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company."

Turning to the act of July 27, 1866 (14 Stats. 292, c. 278) we find an act of Congress providing for the construction, and granting lands in aid thereof, of a railroad to be built from Springfield, Missouri to the Pacific Ocean by the Atlantic & Pacific Railroad Company. By Section 3 thereof there was granted to the railroad company twenty alternate sections of land per mile on each side of the right of way through the territories and ten alternate sections on each side of the right of way in the states through which it passed, mineral lands excepted. There was, however, no provision in the act similar to that in Section 9 of the grant to the Texas Pacific with reference to settlement and pre-emption of the lands granted to the railroad company. In other words, the railroad company was left free to dispose of its lands upon such terms and conditions as it might deem best. Section 18 of this act of July 27, 1866 authorized the Southern Pacific Railroad Company to connect with the Atlantic & Pacific Railroad Company at such point near the boundary line of California as it should deem most suitable for a railroad line to San Fran-

cisco and in consideration thereof, to aid in its construction, it was further provided that the said Southern Pacific Railroad "shall have similar grants of land subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations as to time and manner with the Atlantic & Pacific Railroad herein provided for."

It would, therefore, seem obvious that, so far as the Southern Pacific Railroad Company is concerned, it was the intention of Congress that the lands granted to it by the act of March 3, 1871, were to be accompanied with the same rights, grants and privileges and subject to the same limitations, restrictions and conditions as were granted to the Southern Pacific Railroad Company by the act of July 27, 1866. In fact, the act so provides specifically. It is not conceivable how language could be made more explicit in this respect than the language contained in the act of March 3, 1871. Yet we find counsel apparently seriously contending that the act does not mean what it says, but that it must be so construed as to make the grant to the Southern Pacific Railroad Company under Section 23 of the act of March 3, 1871 subject to the provision in Section 9 of the grant to the Texas and Pacific subjecting the lands to settlement and pre-emption at a price not exceeding an average of $2.50 per acre. In other words, the Southern Pacific Railroad Company was not to receive its land grant with the same rights, grants and privileges as were contained in the grant of July 27, 1866, but was

to have the limitations, restrictions and conditions imposed upon the Texas Pacific by the provision in Section 9 also imposed upon the Southern Pacific grant. Section 9 of the act of March 3, 1871 does not contain any grant to the Southern Pacific. The grant therein provided for is a grant to the Texas Pacific Railroad Company, its successors and assigns. The Southern Pacific Railroad Company is not mentioned nor is any grant made to it until Section 23 is reached. This section is the last section in the statute. It contains a grant to the Southern Pacific Railroad Company. It prescribes its rights, grants and privileges, and limitations, restrictions and conditions in accordance with the previous grant of July 27, 1866. That grant alone is made the measure of the Southern Pacific Railroad Company's rights and privileges and its limitations, restrictions and conditions. The act of March 3, 1871 involved two separate grants, one to the Texas and Pacific upon the terms and conditions prescribed in that act, the other to the Southern Pacific Railroad Company with the rights and qrivileges and upon the terms and conditions prescribed in another act.

This suit is a companion suit to the case of Burke v. Southern Pacific Railroad Company involving the same contentions, decided April 2nd, 1915, by Judge Bledsoe for the United States District Court, Southern District of California. (222 Fed. 97.) There is nothing that we could add to the reasoning of Judge Bledsoe's opinion which clearly and convincingly disposes of the points made by the plaintiff in that

case, and we are content to rest this case upon Judge Bledsoe's opinion in the Burke case with only such additional comments as may seem desirable in view of the fact that appellant's counsel in the present case has framed his argument along somewhat different lines than those advanced in the Burke case, although the conclusion sought to be established in both cases is the same, that is, that the Southern Pacific Railroad Company is bound by the provisions of Section 9 of the act of March 3, 1871 as well as the Texas and Pacific.

In order to reach this conclusion appellant's counsel has discussed from his point of view the history of the land laws of the United States, the development of the policies of Congress in regard to public domain and donations of public lands to railroads, the evils of unrestricted grants and the history of the act of March 3, 1871, all of which apparently is designed to establish his contention that at the time of the passage of the act of March 3, 1871 there was a growing sentiment against the granting of public lands to aid in the construction of railroads and that "the history of Congress shows that from March 3, 1869 up to the passage of this act of March 3, 1871, there wasn't a grant made or an old grant revived or extended that did not have attached to it a settlers' clause" and that "this had become the settled policy of Congress." With this premise established to his satisfaction, counsel further argues that "It would be absurd and ridiculous to place upon this act (March 3, 1871) a construction under these circum-

stances that placed Congress in the position of reversing the unquestioned established policy by adding the settlers' clause to all of these land grants and also adding it to the main purpose which induced the act of March 3, 1871, and giving, without any restrictions, limitations or conditions, a large grant to these defendants."

In connection with this argument counsel relies upon the doctrine of *in pari materia* as entitling him to construe the act of March 3, 1871 with certain other land grants to railroad companies. In order to avoid the embarrassment that would result from the fact that from the time of the first grant to the Illinois Central on September 20, 1850 to the Texas Pacific grant of March 3, 1871, no land grants to railroads contained any "settlers' clause" with the exception of the grant to the Oregon Central Railway Company by the act of May 4, 1870 and the Texas Pacific grant of March 3, 1871, appellant's counsel divides the history of grants of public lands in aid of railroads into three distinct periods and has assigned the grants to the Oregon Central Railway Company and the Texas and Pacific to the third and last period (Appellant's brief, page 37). Counsel then argues that, being entitled to construe the Texas and Pacific grant "with all other grant acts covering that period," that is, the period covering the grant to the Oregon Central Railway Company and the Texas and Pacific grant, and it appearing, according to counsel, that the grants to the Oregon Central and to the Texas and Pacific clearly define the policy of Con-

gress in favor of the insertion of the settlers' clauses in such grants, the doctrine of *in pari materia* will require the insertion of such a settlers' clause in the grant made to the Southern Pacific Railroad Company by Section 23 of the act of March 3, 1871 (Texas and Pacific grant). Stated in another way, counsel's contention is that so much of Section 23 of the act of March 23, 1871 as provides that the grant made by that act to the Southern Pacific Railroad Company shall carry the same rights, grants and privileges and be subject to the same limitations, restrictions and conditions as were granted by the act of July 27, 1866 shall be disregarded. The basis for this contention is that inasmuch as the grant to the Oregon Central Railway Company by the act of May 4, 1870 and the grant to the Texas and Pacific by the act of March 3, 1871 contained certain limitations and conditions in favor of settler Congress must have intended to insert such a clause in the grant to the Southern Pacific Railroad Company under Section 23 of the act of March 3, 1871. This conclusion can only be reached upon the theory that Congress did not mean what it said when it provided that the act of July 27, 1866 should be the measure of the Southern Pacific's rights, grants and privileges and limitations, restrictions and conditions, and carefully refrained from imposing any provision or condition as to the sale to actual settlers.

It is not deemed necessary to follow Appellant's counsel in his discussion of the history of the land laws and the evils of unrestricted grants, or the his-

tory of the bill of March 3, 1871, or to indulge in any extended discussion of the cases cited by him with reference to the doctrine of *in pari materia*. It is obvious, of course, that the act of July 27, 1866 must be referred to in order to ascertain the rights of the Southern Pacific Railroad Company under the grant made to it by Section 23 of the act of March 3, 1871. The policy of Congress as evidenced by any other grant it may have made to any other railroad company is not material or relevant in any degree. Its policy, so far as the grant to the Southern Pacific Railroad Company was concerned, is evidenced by clear and unmistakable language. While all acts granting lands to aid in the construction of railroads have necessarily certain provisions more or less in common, each of them contains, almost without exception, conditions and requirements that are applicable to that particular railroad alone. If counsel's contentions are correct and the conditions prescribed in every railroad land grant act should be deemed applicable to every other railroad land grant act, regardless of the provisions of that act, hopeless confusion and uncertainty would result. The subject-matter in each act, however, is entirely different and each statute must be governed by its own provisions, and where Congress has, as in the present case, specifically said that the provisions of a certain statute shall govern it is impossible to believe that Congress meant that the provisions of another act, which are quite inconsistent with the statute to which specific reference is made, must also be deemed included. Not only must the statute relate to the same subject

(Lewis Sutherland Stat. Cons. 2nd Ed., Vol.2, Sec. 443), but it is not *in pari materia* "though it may incidentally refer to the same subject if its scope and aim are distinct and unconnected." (Id. Sec. 449). Moreover, "While it is thus true that statutes relating to the same subject are to be construed together, this rule does not go to the extent of controlling the language of subsequent statutes by any supposed policy of previous statutes, where such language requires such policy to be disregarded. Where the last statute is complete in itself, and intended to prescribe the only rule to be observed, it will not be modified by the displaced legislation, as laws *in pari materia* (Id. Sec. 447). As stated in Vol. 36 Cyc. 1150:

> "It must not be overlooked, however, that the rule requiring statutes *in pari materia* to be construed together is only a rule of construction to be applied as an aid in determining the meaning of a doubtful statute, and that it cannot be invoked where the language of a statute is clear and unambiguous."

Congress could, of course, have imposed other conditions or limitations upon the Southern Pacific Railroad Company by the act of March 3, 1871, if it desired to do so. It may be that it refrained from imposing upon the grant to the Southern Pacific the restriction with reference to the sale to settlers that was imposed upon the grant to the Texas Pacific because he grant to the Southern Pacific was merely, in effect, the grant of a branch line to its main line grant of July 27, 1866, and it was deemed more desirable and consistent to have its branch line grant have

the same rights, conditions and requirements as its main line grant than to require its construction under other and different conditions. Possibly, also, Congress was influenced by the fact that the branch line grant given to the Southern Pacific by the act of March 3, 1871 came in substantial conflict with a prior grant to the Atlantic & Pacific. This not only materially lessened the value of the grant to the Southern Pacific, but it rendered its title to all the land within the conflicting limits of the two grants uncertain and the inadvisability of inserting any provision which might induce settlers to believe they could secure a good title through the Southern Pacific by virtue of this grant was apparent. In fact, the Southern Pacific lost title to all the lands, both primary and indemnity, within the conflicting limits of the two grants although the Southern Pacific constructed its railroad and the Atlantic & Pacific did not a*U. S. v. S. P. R. R. Co.,* 146 U. S. 570; *U. S. v. Colton M. & S. Co.,* 146 U. S. 615).

It is not material, however, what the reasons were that actuated Congress in making the grant, or in determining what restrictions or limitations should accompany it. "It is a well settled rule that so long as the language is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy, and it is the plain duty of the Court to give it force and effect" (36 Cyc. 1115). The language of the statute is plain and unequivocal. As was said by Judge Bledsoe in the Burke case (222 Fed. 103):

> "I can come to no other conclusion than that the intention of Congress was, as gathered from its apt, expressive, unequivocal, and unambiguous language, that the Southern Pacific Railroad Company should receive a grant of land along both sides of the road to be constructed from Mojave, through Los Angeles, to Yuma, of the same general nature, and subject only to the same conditions and limitations as specified in the grant to the same road for the similar purpose of constructing its line from Mojave to Needles; that there is nothing from which it could be rationally deduced or inferred that Congress intended that the grant to the Southern Pacific was to be clogged with the condition imposed upon the grant to the Texas Pacific; and that for this Court so to declare would be for it to usurp the legislative functions of the government and to set at naught the plainest principles of statutory interpretation and constitutional justice."

It may be observed in conclusion that, as stated in the opinion of Judge Bledsoe in the Burke case, supra, the Supreme Court of the United States in litigation involving this grant "followed the obviously natural construction adopted hereinabove" and held "that the grant to the Southern Pacific was 'with the same rights, grants, and privileges, and subject to the same limitations,' etc., as in the act of July 27, 1866 (189 U. S. 449, 23 Sup. Ct. 568, 47 L. Ed. 896). So, also, on page 450, of 189 U. S., on page 568 of 23 Sup. Ct., 47 L. Ed. 896, the Court said: 'The Texas Pacific act refers to the act of July 27, 1866, for the rights conferred on the Southern Pacific."

While this case is of but little importance in itself, it is one of nearly five hundred similar claims upon which suits have been filed, with several hundred new ones in preparation, all of which have been fostered by Mr. Burke and his associates whose chief interest therein apparently is certain fees which they expect to secure from those whom they may induce to advance money in promoting litigation of this character. (*Burke v. S. P. R. R. Co.*, 222 Fed. 97.)

A great deal of the land involved is already under contract of sale by the Southern Pacific Railroad Company to purchasers whose title is of course clouded by suits of this character. Moreover, it is important that those who are being led to expend money at the instance of Mr. Burke and his associates in cases of this kind should be disabused of any erroneous impressions that may have been created in their minds as to their ability to maintain such cases.

It is to be regretted that this Court's time must be taken up with cases of this character. The fact, however, that such cases may have no substantial foundation does not make them any the less annoying or injurious to the rights of others.

It is respectfully submitted that the decree of the Court below should be affirmed.

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